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RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

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18 MUTUAL HOLDINGS (BERMUDA) LIMITED

19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT

21 Oakland Division

22 MUTUAL HOLDINGS (BERMUDA)
23 LIMITED,

24 Plaintiff,

25 vs.

26 SINCLAIR-DWYER & COMPANY,
27 INC.,

28 Defendant.

Case No.

007-04505

ADR
JUL
COMPLAINT FOR MONEY JUDGMENT
AND ORDER RECOGNIZING
CONCLUSIVENESS AND
ENFORCEABILITY OF FOREIGN
COUNTRY MONEY JUDGMENT

29 Plaintiff Mutual Holdings (Bermuda) Limited ("Mutual Holdings"), by its attorneys,
30 Manatt Phelps & Phillips, LLP and Ballard Spahr Andrews & Ingersoll, LLP, for its complaint
31 against Defendant Sinclair-Dwyer & Company, Inc. ("Defendant" or "Sinclair-Dwyer"), alleges
32 as follows:
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34
35

JURISDICTION

1
2 1. This is an action for money judgment and an order recognizing the conclusiveness
3 and enforceability of a foreign country money judgment under Cal. Civ. Proc. Code. §§ 1713, *et*
4 *seq.*, and under principles of international comity.

5 2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C.
6 §§ 1332(a)(2), because the amount in controversy exceeds \$75,000, exclusive of post-judgment
7 interest and costs, and because there is diversity of citizenship between the parties.

8 **INTRADISTRICT ASSIGNMENT**

9 3. Assignment of this action to the Oakland Division of this Court is appropriate
10 because: (1) Defendant has its principal place of business in San Leandro, California, and (2) a
11 substantial part of the events or omissions giving rise to the claims occurred in Alameda County.

12 **VENUE AND PARTIES**

13 4. Plaintiff Mutual Holdings is a Bermuda company with its principal place of
14 business in Hamilton, Bermuda.

15 5. Defendant Sinclair Dwyer is, and at all times herein mentioned was, an insurance
16 agency duly organized and incorporated in California, with its principal place of business at
17 15890 Foothill Boulevard, San Leandro, California 94578.

18 6. Venue is proper in this district under 28 U.S.C. § 1391(a)(1), because Sinclair
19 Dwyer resides in the Northern District of California, and a substantial part of the events or
20 omissions giving rise to the claims occurred in this district.

21 **FACTUAL BACKGROUND**

22 7. On April 2, 2007, following a trial on the merits, the Supreme Court of Bermuda,
23 Commercial Division, entered a money judgment in favor of Mutual Holdings against Sinclair
24 Dwyer in the amount of \$2,575,105 plus Mutual Holdings' costs of the action. *See* Judgment
25 attached hereto as **Exhibit A**.

26 8. The matter in the Supreme Court of Bermuda arose out of Sinclair Dwyer's failure
27 to indemnify Mutual Holdings from reinsurance underwriting losses as required under its
28 shareholder agreements with Mutual Holdings.

9. As of the date of filing of this Complaint, Sinclair Dwyer has not satisfied the Judgment entered by the Supreme Court of Bermuda ("Bermuda Judgment").

10. Mutual Holdings seeks an order pursuant to California's Uniform Foreign Money-Judgment Recognition Act ("UFMJRA"), California Code of Civil Procedure §§ 1713, *et seq.*, recognizing and enforcing the Bermuda Judgment and entering judgment in the dollar amount of the Bermuda Judgment along with post-judgment interest, costs, and fees. Additionally and in the alternative, Mutual Holdings seeks an order recognizing and enforcing the Bermuda Judgment according to general principles of international comity.

General Description of the Insurance Profit Centre Program

11. Mutual Risk Management Limited is a holding company that owns Mutual Holdings and other on-shore companies including Legion Insurance Company ("Legion"). Mutual Holdings in turn owns Mutual Indemnity (Bermuda) Limited ("Mutual Indemnity"), both of which are offshore companies.

12. Mutual Holdings was one of the companies involved in a "rent-a-captive program" marketed under the product name "Insurance Profit Centre" ("IPC").

13. Many small to medium sized US companies sought workers compensation coverage in the alternative insurance markets starting in the early 1990's, because premiums became prohibitively expensive in the traditional insurance market. The IPC program allowed such companies to participate in the profit or loss of its workers compensation program by the client managing its more frequent but less severe losses which could be predicted year after year. So long as the company participating in the IPC program managed its risks well, it benefited from reduced premiums, underwriting profit sharing, and investment income. However, IPC clients were required to indemnify the offshore reinsurance underwriter to cover underwriting losses exceeding an agreed upon threshold. IPC clients were also required at the outset of the program and as required thereafter to provide the offshore reinsurance underwriter with cash and/or a letter of credit as collateral to cover underwriting losses.

14. The IPC program also appealed to insurance agencies looking to profit on the underwriting of policies it sold. For agency business, Legion issued insurance policies to the

1 underlying insureds, Legion ceded the risks to the IPC reinsurer, and the IPC agency client
 2 indemnified the IPC reinsurer and/or its holding company against losses on the program in
 3 exchange for receiving any underwriting profits.

4 15. Mutual Holdings required all of its IPC clients to enter and abide by shareholder
 5 agreements. The shareholder agreements governed the terms of the IPC client's underwriting
 6 risks, indemnity liabilities and profit share.

7 16. Under Mutual Holdings' IPC program, if Mutual Indemnity made an underwriting
 8 profit from reinsurance ceded under the program, it would pay those profits by way of dividends
 9 to its parent, Mutual Holdings. Mutual Holdings would distribute profits to its shareholders
 10 pursuant to their shareholder agreements. If Mutual Indemnity suffered an underwriting loss, the
 11 IPC client, having taken on the risk, was responsible for indemnifying Mutual Holdings/Mutual
 12 Indemnity.

13 **Sinclair Dwyer's Participation in the IPC Programs as a Client and Shareholder**

14 17. Sinclair Dwyer is a California insurance agency that wished to participate in the
 15 underwriting profitability of the risks of its workers compensation insurance customers. It was
 16 authorized by Legion to act as its broker in obtaining workers compensation business from
 17 Sinclair's customers. Mutual Indemnity provided a rent-a-captive reinsurance facility for this
 18 business, under which Legion reinsured this workers compensation business with Mutual
 19 Indemnity.

20 18. In or about January 1999, Sinclair Dwyer entered into an IPC program provided by
 21 Mutual Holdings and Mutual Indemnity. In or about January 2001, Sinclair Dwyer subdivided
 22 that initial program into three new IPC programs provided by Mutual Holdings and Mutual
 23 Indemnity.

24 19. Each of the four IPC programs, designated D37, E37, F37 and K33 respectively,
 25 had its own shareholder agreement. Each shareholder agreement contained the following
 26 indemnification language:

27 3(A) Shareholder hereby indemnifies and hold Mutual and Indemnity harmless
 28 against the cumulative sum of paragraphs 2(A), 2(B) and 2(C) minus the
 cumulative amount of dividends paid, being less than zero at any point in time. On

1 receipt of each written demand by Mutual or Indemnity, Shareholder agrees to pay
2 Mutual or Indemnity within 30 days, the amount by which the cumulative sum of
3 the amounts calculated under paragraphs 2(A), 2(B) and 2(C) minus the
4 cumulative amount of dividends paid pursuant to this agreement, are less than zero
5 minus all previous payments under this paragraph provided however that the
6 definition of incurred losses and loss expenses in paragraph 2(C) shall for this
7 purpose only include losses and loss expenses which have been paid or are likely
8 to be paid within the following ninety (90) days.

9 20. Sinclair Dwyer's indemnity exposure was equal to the difference between the loss
10 fund (the gross premiums paid less expenses) and the aggregate attachment point ("AAP") which
11 was calculated by reference to gross written premiums. The difference between the loss fund and
12 the AAP was known as the "gap."

13 21. The insurance business provided by Sinclair Dwyer was unprofitable and
14 generated losses under the IPC programs.

15 22. The losses on all of Sinclair Dwyer's IPC programs exceeded the AAP in each
16 program year. Sinclair Dwyer was thus liable to "fund the gap" to indemnify Mutual Holdings
17 for the losses. While the gap was partly covered by collateral provided by Sinclair Dwyer plus
18 investment income, the collateral and investment income earned were insufficient to satisfy
19 Sinclair Dwyer's liability to Mutual Holdings.

20 23. Sinclair Dwyer refused to indemnify Mutual Holdings.

21 **PROCEDURAL HISTORY OF THE BERMUDA ACTION**

22 24. On February 1, 2006, Mutual Holdings filed a Writ of Summons (the English legal
23 system's equivalent of a complaint in US practice) against Sinclair Dwyer in the Supreme Court
24 of Bermuda, Civil Jurisdiction 2006 No. 33, seeking indemnification under the shareholder
25 agreements. Mutual Holdings sought \$2,441,088 plus interest, constituting the losses under the
26 four IPC programs. See Writ of Summons attached hereto as **Exhibit B**.

27 25. Bermuda law firm Wakefield Quinn entered its appearance on behalf of Sinclair
28 Dwyer. On April 10, 2006, Wakefield Quinn filed Sinclair Dwyer's "Statement of Defence" (the
English equivalent of an answer in US practice) wherein it denied liability and posited that it was
fraudulently induced to enter the shareholder agreements with Mutual Holdings. See Statement
of Defence attached hereto as **Exhibit C**.

26. Following the Bermuda Court's striking of various paragraphs of the Statement of Defence, the only issues which Mutual Holdings was required to prove at trial were that: (1) it suffered losses; and (2) Sinclair Dwyer was obliged to indemnify Mutual Holdings for those losses.

27. In support of its indemnity claim, Mutual Holdings filed the Witness Statement of David Alexander, Vice President and Director of Mutual Holdings and President and Director of Mutual Indemnity.

28. In its defense, Sinclair Dwyer filed the Witness Statement of its President and CEO, Mr. Michael Dwyer.

29. Wakefield Quinn defended the case on behalf of Sinclair Dwyer until March 15, 2007, two weeks before the scheduled trial, when the firm withdrew its appearance before the Bermuda Court. Since that time, no other attorney has entered an appearance in the Supreme Court of Bermuda on behalf of Sinclair Dwyer.

30. On April 2, 2007, the Supreme Court of Bermuda held a bench trial where Mutual Holdings was required to present evidence and arguments to the Court in support of its indemnity claim. No person or attorney appeared at the trial on behalf of Sinclair Dwyer despite proper notice. No person or attorney on behalf of Sinclair Dwyer made any effort to continue the trial or enjoin the Court from holding the trial.

31. At the trial, Vice-President and Director of Mutual Holdings David Alexander testified on behalf of Mutual Holdings. Mutual Holdings also admitted in evidence all the relevant documents in support of its claim.

32. At the conclusion of the trial, upon considering the testimony and documentary evidence presented, the Court entered judgment for Mutual Holdings and ordered Sinclair Dwyer to pay Mutual Holdings \$2,575,105 (comprising \$2,004,764 and \$570,341 contractual interest at 8% from September 12, 2003). The Court also ordered Sinclair Dwyer to pay Mutual Holdings its costs of the action, assessed by the Court on May 30, 2007 at \$43,964.25. *See* Registrar's Taxation of Bill of Costs attached hereto as **Exhibit D**.

33. On April 27, 2007, counsel for Mutual Holdings sent a letter to Sinclair Dwyer President and CEO Mr. Michael Dwyer along with a copy of the Bermuda Judgment and Bill of Costs. Counsel for Mutual Holdings requested that Mr. Dwyer contact him by the close of business on Friday May 4, 2007 to arrange for prompt payment of the Bermuda Judgment and Bill of Costs relating thereto. See April 27, 2007 Letter (without enclosures) attached hereto as Exhibit E.

34. Sinclair Dwyer has not responded to the April 27th Letter, nor has it paid the Bermuda Judgment or Bill of Costs.

35. Sinclair Dwyer has not appealed or challenged the Bermuda Judgment in any manner.

FIRST CLAIM FOR RELIEF:

**RECOGNITION AND ENFORCEMENT
PURSUANT TO THE UNIFORM FOREIGN-MONEY JUDGMENT ACT
(Cal. Civ. Proc. Code. §§ 1713, *et seq.*)**

36. Mutual Holdings hereby incorporates paragraphs 1 through 35 above as though fully set forth herein.

37. The Bermuda Judgment was duly entered in Bermuda, a foreign state, and it is enforceable in California pursuant to the Uniform Foreign Money-Judgments Recognition Act ("UFMJRA"). Cal. Civ. Proc. Code. §§ 1713, *et seq.*

38. The Bermuda Judgment is a "foreign judgment" that is final and conclusive and enforceable under the laws of Bermuda, the jurisdiction where it was rendered. Cal. Civ. Proc. Code. § 1713.2.

39. The Bermuda Judgment was rendered under a system which provides impartial tribunals and procedures compatible with the requirements of due process of law. Cal. Civ. Proc. Code. § 1713.4(a)(1).

40. The Supreme Court of Bermuda had personal jurisdiction over Sinclair Dwyer because Sinclair Dwyer voluntarily appeared in the proceedings. Cal. Civ. Proc. Code. § 1713.5(a)(2).

1 41. None of the discretionary grounds for denying recognition of a foreign judgment
2 are applicable to the recognition of the Bermuda Judgment. Cal. Civ. Proc. Code. § 1713.4(b).

3 42. In light of the foregoing, the Bermuda Judgment is conclusive between Mutual
4 Holdings and Sinclair Dwyer pursuant to Section 1713.3 of the UFMJRA and is enforceable in
5 California in the same manner a judgment rendered in a sister state.

6 **SECOND CLAIM FOR RELIEF:**

7 **RECOGNITION AND ENFORCEMENT**
8 **PURSUANT TO PRINCIPLES OF INTERNATIONAL COMITY**

9 43. Mutual Holdings hereby incorporates paragraphs 1 through 42 above as though
10 fully set forth herein.

11 44. Courts of the State of California have the authority to recognize foreign judgments
12 even in circumstances where the judgments are not covered by the UFMJRA. Cal. Civ. Proc.
13 Code. § 1713.7.

14 45. The Bermuda Judgment is entitled to full recognition and enforcement pursuant to
15 the UFMJRA as well as to traditional principles of international comity as understood and applied
16 by the courts of the United States of America and the State of California.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Mutual Holdings prays for judgment as follows:

19 A. Recognizing and enforcing the Bermuda Judgment against Sinclair Dwyer in the
20 amount of U.S. \$2,575,105.00 plus interest thereon from April 2, 2007.

21 B. Directing that Mutual Holdings be awarded costs and disbursements of both the
22 Bermuda action and this action, and granting Mutual Holdings such further relief as the Court
23 may deem proper.

24 C. For an order declaring the Bermuda Judgment entitled to recognition under the
25 UFMJRA, conclusive between Mutual Holdings and Sinclair Dwyer and entitled to enforcement
26 in the State of California and the United States of America.

27 D. For an order declaring the Bermuda Judgment entitled to recognition under
28 principles of international comity, conclusive between Mutual Holdings and Sinclair Dwyer, and

1 entitled to enforcement in the State of California and the United States of America.

2 E. For such other and further relief as the court may deem just and proper.

3 Respectfully submitted:

4 Dated: August 30, 2007

MANATT, PHELPS & PHILLIPS, LLP

6 By: 

John P. Kern

Attorneys for Plaintiff

MUTUAL HOLDINGS (BERMUDA) LIMITED

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury of all issues triable by a jury.

Dated: August 30 2007

MANATT, PHELPS & PHILLIPS, LLP

By: 

John P. Kern

Attorneys for Plaintiff

MUTUAL HOLDINGS (BERMUDA) LIMITED

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